NO. 45662-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATHEW DELANO GIPSON
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jennifer Forbes, Judge

BRIEF OF APPELLANT

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B. ASSIGNMENTS OF ERROR

1. The trial court's refusal to permit cross examination of relevant facts not raised by the prosecutor on direct examination violated appellant's confrontation clause rights under both the state and federal constitutions.

2. Gipson was denied his constitutional right to present a defense by the trial court's wholesale restriction on his ability to present facts relevant to his defense.

3. The trial court erred by imposing an exceptional sentence based on the aggravating factor retaliating against a public officer where there were no public officers involved in this case, but rather peace officers not defined for the jury and not found to be involved in Gipson's case.

Issues Presented on Appeal

1. Was the trial court's refusal to permit cross examination of relevant facts not raised by the prosecutor on direct examination, a violation of appellant's confrontation clause rights under both the state and federal constitutions?

2. Was Gipson denied his constitutional right to present a defense by the trial court's wholesale restriction on his ability to present facts

relevant to his defense?

3. Did the trial court err by imposing an exceptional sentence based on the aggravating factor retaliating against a public officer where there were no public officers involved in this case, but rather peace officers not defined for the jury and not found to be involved in Gipson's case?

B. STATEMENT OF THE CASE

a. Procedural Facts.

Gipson was charged and convicted of two counts of assault against a police officer and one count of attempting to disarm a police officer, each with the aggravating factor that the crimes were committed in retaliation of the public officer's performing his duties. RCW 9.94A.535 (x) CP 140-152.

b. Trial Facts

Officer Wofford was training a new officer, Horsley, when they received a dispatch to the MoonDogs Tavern regarding a bar fight involving 4-5 women. RP 219, 231-232, 340. On arrival at the scene, Wofford saw 4 -5 women leaving the area but he did not investigate. Bentley, the security bouncer for MoonDogs had detained the victim of the fight inside the Tavern for her own protection and handed her over to the police who promptly

arrested her without investigation. RP 160-161, 174-175. A crowd of 30-200 people, depending on whether Wofford (150-200), Horsley (30-50) or Bentley (50-70) was accurate, were milling about. RP 162, 238, 243, 310, 332-333, 360.

Fortin and Gipson, along with the crowd, were yelling to the police that they were arresting the wrong person. RP 162, 238, 243, 310, 332-333, 360; CP 1-4. Fortin the arrested woman's boyfriend was arrested, and Gipson, a friend of Fortin's became quite upset and kept yelling at the police that they were arresting the wrong people. RP 162, 163, 166, 238. Wofford told Gipson to leave 4-5 times and threatened to arrest Gipson if he did not leave the area. RP 242. Gipson did not leave, and Bentley decided to grab Gipson to calm him down, but in fact held Gipson while Horsley and Wofford grabbed Gipson to arrest him. RP 166, 184-185, 244.

Gipson yelled "fuck no", spun around, and Wofford took Gipson to the ground and landed on top of him face to face. RP 248-250. Wofford testified that while he was on the ground on top of Gipson, Gipson punched him in the face. Horsley and Bentley testified that they did not see Gipson strike Wofford. RP 196-197, 251, 348. Wofford did not write in his report that Gipson punched him, and the statement of probable cause did not contain

this information. RP 347; CP 1-4.

Wofford testified that Gipson slid his left hand in between their bodies and tried to grab Wofford's holster. RP 253, 257. Horsley never saw Gipson grab the holster and Horsley was holding and pulling hard on Gipson's left arm at the same time Wofford indicated that Gipson was grabbing his gun. RP 253, 353-354. Horsley could not determine if his pulling on Gipson's arm and banging Wofford holster into the ground could have felt like someone grabbing the holster. RP 433. Horsley who was holding on to Gipson never heard Gipson tell Wofford "I'm going to get you", but Wofford testified that Gipson made this statement. RP 312, 314, 349.

Bentley testified that he saw Gipson put his hand on the gun, but the statement of probable cause indicated that when Wofford yelled "he has my gun", Gipson said, "no" or "whoa". CP 1-4. Wofford testified that Gipson said "whoa". RP 256. Another officer, Morrison, stepped into the scene and tased Gipson several times until Wofford was able to place Gipson in handcuffs. RP 256, 338, 339.

c. Denial Of Cross-Examination 1

. Defense counsel was prohibited from asking any questions about the entire scene at MoonDogs leading up to the arrest of Gipson. RP 266-289. For example, (1) defense counsel was not allowed to cross examine on the fact that the crowd was telling the police they were arresting the wrong people. RP 318-320; (2) the Court ordered that defense not ask any questions about police aggression or wrong doing unless they produced an expert. RP 320-321. The court further ordered defense not to use the terms "justified" or "proper" unless they produced an expert. RP 323. The court also refused to permit defense counsel to cross-examine Wofford about his police report or to ask any questions not asked on direct examination. RP 266-289.

> BY MORRISON
> Q. Okay. So let's go back to the night of this incident. You were riding with Officer Horsley?
> A. Yes.
> Q. And you were his field training officer, right?
> A. Yes.
> Q. You were in the passenger seat?
> A. Yes.
> Q. You receive a call from dispatch indicating that there are four or five females in a fight at the MoonDogs?
> A. Yes.
> Q. Did you immediately respond there?
> A. We did.

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1 Counsel acknowledges the great length of this portion of the transcript, but feels it is essential to include this portion to permit this Court to understand the scope of the confrontation clause violation.

Q. Okay. Can you tell the jury what came to your

Q. Okay. So let's go back to the night of this incident. You were riding with Officer Horsley?
A. Yes.
Q. And you were his field training officer, right?
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Q. You were in the passenger seat?
A. Yes.
Q. You receive a call from dispatch indicating that there are four or five females in a fight at the MoonDogs?
A. Yes.
Q. Did you immediately respond there?
A. We did.
Q. Okay. Can you tell the jury what came to your

THE COURT: Okay. The objection is sustained. You can bring back the jury.
MORRISON: Your Honor, if I may. I need to make a record. It is our position that -- I would ask, can we excuse the officer during this?
THE COURT: Can you step outside, please.
(Officer exits courtroom.)
MORRISON: The State is claiming that my client incited this situation and that he was the one that was getting the crowd all incited. We're arguing that's not the case. My client isn't the one. It was actually Officer Wofford. He had information when he first arrived upon the scene that there were four to five individual ladies who had gotten into an altercation in the bar.
Upon his arriving at the scene, he sees these four to five individuals. But he doesn't just see them, he notices something quite peculiar about them. These individuals with the lights flashing and based on his training and experience, the fact that they did not look at him made him believe that somehow

they were involved. But he didn't use that information. He came and arrested somebody without asking a single question at that point in time. That is our entire theory of the case.

It is our position that this officer's testimony is based on the fact that he needs to substantiate what his actions were and we can show that his actions were wrong. If we can't argue this, then you're depriving Gipson of putting on his entire theory of the case and evidence that supports it. If the Court is going to say how it's not relevant, I would like to know. But it is relevant. I would ask, Your Honor, to please allow us to put on our theory of the case and give him a fair shot here because it is relevant.

THE COURT: I'm not seeing how his not responding to four people walking away incited the actions that followed. I'm not seeing that. You're not making that connection for me.

MORRISON: What I'm saying, right, is he had information. He had information that there's four to five females that were in a fight. He sees four females walking away. The lights are flashing and it drew his attention, why are these people not looking at me? And it turns out these people were actually involved in the fight.

THE COURT: I understand that. You don't have to restate the facts again to me. Tell me how that incited anything that happened.

MORRISON: Well, the reason that everyone was -- the reason Fortin and Gipson were directing their attention to the officers and yelling was they're saying, you're arresting the wrong people. It's those people leaving that are the ones who did this, not her. It's them. They're pointing, hey -- he didn't want to hear it.

THE COURT: You don't have an expert to testify that the officer did anything improper in terms of policy, procedure or the law. So I'm not sure that you have any basis to proceed with some argument that Officer Wofford did anything improper under the law.

MORRISON: I'm putting the entire situation into context. With all of this context, I'm going to show that he's been untruthful and that none of this stuff that he says happened how he says it happened. And I can prove it. I've got it. I can do it. If you just let me put on my case. If you're going to limit what's in his police reports, for goodness sakes, this is what he wrote in response to this. And you're telling me I can't ask him what he put in the report. That's essentially what you're saying.

THE COURT: Impeachment on a collateral matter is not impeachment on a substantive issue, which is what you're supposed to be going for.

MORRISON: Well, he's training this individual, which he testified to. And when you see something like that in the vehicle, he's passing this information on. He's sitting there telling him earlier --

THE COURT: The objection is sustained. You can bring back the jury.

THE BAILIFF: Would you like the officer, too?

THE COURT: Yes, please.

MORRISON: I can't even ask if he saw four to five females leaving?

THE COURT: We're not going to go into anything other than what he testified to on direct.

MORRISON: He testified to that.

THE COURT: He did not testify to that on direct. The testimony I picked up, I believe, at the

point where he says Fortin on the ground and draws his attention to the defendant.
MORRISON: So anything that anybody -- anything that other people saw that he didn't testify to, I can't even ask him about?
THE COURT: You're trying to create evidence to impeach him. That's inappropriate.
MORRISON: I'm not creating it. It's in his report.
THE COURT: He didn't testify to it on direct, so you're impeaching him on what he testified to on direct.
The jury's coming in.
MORRISON: His report should be in there.
(The following occurred in the presence of the jury.)
THE COURT: The objection is sustained.
Morrison.

BY MORRISON:
Q. You received a call indicating that there were four or five females that were in an altercation at the bar, correct?
A. Yes.
Q. So was it your goal to apprehend everyone who was involved in this incident while going to the bar?
MS. MONTGOMERY: Objection, relevance.
THE COURT: Sustained.
BY MORRISON:
Q. What was your goal while going to the

A. My goal was to watch Officer Horsley and to see how conducted an investigation.
Q. And you testified earlier that it's your job to enforce the law, correct?
A. Yes.
Q. And you received a call indicating that there was

fighting going on, correct?
A. Yes.
Q. And you indicated to the jury that fighting in public constitutes the breaking of the law, correct?
A. Yes.
Q. And so your purpose of going to the bar is to investigate this fighting, correct?
MS. MONTGOMERY: Objection. Asked and answered.
THE COURT: Overruled.
THE WITNESS: Yes.
BY MORRISON:
Q. And in doing so, you already have information that there's four to five people involved, correct?
MS. MONTGOMERY: Objection. Asked and answered.
THE COURT: Sustained.
BY MORRISON:
Q. And were you looking for those four to five people in your investigation to do your job?
MS. MONTGOMERY: Objection. Relevance. Asked and answered.
THE COURT: Sustained.
MORRISON: His job is relevant.
THE COURT: Morrison, move on.
MORRISON: Okay.
BY MORRISON:
Q. So you go to the bar and your initial job you stated earlier was that you're there to observe, correct?
A. Yes.
Q. Let's step back a little bit.
How many times have you testified on the stand?
A. In my life?
Q. Correct.
A. That's a good question.
Q. Just an estimate.
A. Yeah, it's difficult. Because Superior Court, not very often. Less than five in Superior Court.

Q. Okay.
A. Considerably more in the municipal court, but I would say less than 30 times in municipal court. Not too frequent.
Q. Over a 13-year career as an officer at the City of Port Orchard,

Q. And you wrote -- you stated you wrote your report chronologically?
A. As best as I could, yes.
Q. Prior to this you indicated that there was a riot awhile back during your career in the City of Port Orchard?
A. I didn't call it a riot. The entire block filled with people fighting. I guess --
Q. Fighting over what?
A. Well, that's a good question. What do people fight about? We6never determined -- I don't even rememb

determining what that was about. I remember that we had a call for everybody to come to our assistance, and luckily it was shift change at the sheriff's office and they brought a lot of cars. I want to say there was ten to 12 cars at least that came down there for that.
Q. So you called for backup, but you didn't assist? You called for backup, but you didn't assist?
MS. MONTGOMERY: I'm objecting for relevance at this point.
THE COURT: Sustained.
MORRISON: It was on direct examination.
THE COURT: Move on, Morrison.

MORRISON :Q. So you testified earlier that your goal was just to observe?
A. That is the goal, yes.
Q. So you arrive -- can you write on your diagram there exactly where you parked the vehicle or where Officer Horsley parked the vehicle on there.

MS. MONTGOMERY: I'm going to object to the term "exactly." This is clearly not a scale drawing, so just for purposes of our record.
THE COURT: If you can rephrase,

RP 266-276

BY MORRISON:
Q. On direct examination you stated your goal was that you wanted to observe and train Officer Horsley?
A. Yes.
Q. In addition, you also testified that your goal was to determine what happened, correct?
A. Yes.
Q. Okay. When you arrived, when you initially arrived, you immediately arrested a young lady, correct?
MS. MONTGOMERY: Objection. Based on my prior --
THE COURT: Sustained. Sustained Move on, Morrison.
BY MORRISON:
Q. Did you come into contact with anybody when you first arrived?
MS. MONTGOMERY: Same objection.
THE COURT: Sustained, Morrison.

MORRISON: Your Honor, I would ask to take this outside of the presence of the jury.
THE COURT: Denied. Move along.
BY MORRISON:
Q. So when you first arrived at the scene, who did you talk to?
MS. MONTGOMERY: Same objection.
THE COURT: Sustained.
MORRISON: He testified on direct that he --
MS. MONTGOMERY: Objection to speaking objections.
THE COURT: Sustained.
Move on, Morrison.

BY MORRISON:
Q. Did you talk to anybody when you arrived?
MS. MONTGOMERY: Same objection.
THE COURT: Sustained. BY MORRISON:
Q. Did you do anything when you arrived?
MS. MONTGOMERY: Same objection.
THE COURT: If you can narrow the scope of the timeframe, Morrison.
MORRISON: Your Honor, I need to make a record outside the presence of the jury –

THE COURT: Denied. Move along, Morrison. You've made your record.
BY MORRISON:
Q. So when you arrived, where did you go?
MS. MONTGOMERY: Your Honor, I'm going to lodge the same objection.
THE COURT: We could focus in --
MORRISON: I need to ask some questions.
THE COURT: Morrison, you've been advised as to proper timeframe. You need to focus on the proper timeframe. You need to move to that point.
MORRISON: I'm not sure what that timeframe is.
THE COURT: Okay. Going to have the jury step out, please.

THE COURT: Morrison, you were advised that the scope of the direct commenced when the officer indicated that he observed Fortin on the ground and he drew his attention to the defendant from his behavior. That is the beginning of the fact pattern as to what happened on the 19th. That was the limit of the scope of direct.
MORRISON: You can't limit me on that.
THE COURT: I can too.
MORRISON: It's error. That is error.

You are limiting our ability --
THE COURT: Morrison, I ruled.
MORRISON: -- to put on our case, Your Your Honor. That's not fair. You're picking sides.
THE COURT: No, Morrison. I've limited you in accordance with the rules of evidence. If you want to look them over --
MORRISON: I have looked them over. And you know darn well --
THE COURT: Bring the jury back.
MORRISON: Please allow me to make my record for the Court of Appeals.
THE COURT: You've made your record, Morrison.
MORRISON: I have not completely. You're picking sides here. You're limiting a officer's report.
THE COURT: Morrison, the entire scope of a police report is not relevant necessarily in a trial, and you well know that.
MORRISON: Do you know the facts?

THE COURT: Morrison, do not argue with me. Let me make very clear to you, you should know the rules of evidence. The State limited the scope of their direct, they're entitled to do so. That doesn't open it up for you to go down any path you choose to, and that's the situation.
MORRISON: They can't hide evidence for the sole purpose of not allowing me not to talk about it.
THE COURT: What evidence are they hiding?
MORRISON: They're hiding the fact that he knew darn well that he comes straight up and arrests somebody. They came out --
THE COURT: How is that relevant?
MORRISON: He testified that -- he said that you arrested the wrong person. Well, who is this person? He testified to it.

THE COURT: How is that relevant whatsoever?
MORRISON: I can go into it. He testified on the stand. You're telling me I can't go
into what that meant, you arrested the wrong person. Is that what you're saying?
THE COURT: What I'm telling you is you need to stick to what is relevant.
MORRISON THE COURT: Well, I disagree. You can bring back the jury.: It is relevant.

The objection is sustained. Morrison.
BY MORRISON:
Q. What's the first thing that you did in response to this situation?
MS. MONTGOMERY: Objection. Same objection.
THE COURT: Rephrase your question, Morrison.
BY MORRISON:
Q. Let's start with, did you pepper-spray someone?
MS. MONTGOMERY: Objection. Beyond the scope.
THE COURT: Sustained.
MORRISON: All right.

RP 279-284

Q. From the very beginning, could you tell me what Officer Horsley did? What was the first thing that he did under your guidance?
MS. MONTGOMERY: Objection, Your Honor. It's irrelevant.
THE COURT: Overruled.
A. It wasn't under my guidance. I don't know how Officer Morrison and Officer Horsley came into contact with Fortin. I wasn't there at that moment.
BY MORRISON:
Q. You weren't watching over him? You weren't --
MS. MONTGOMERY: Objection, Your Honor.

This is irrelevant. It goes beyond the scope.
THE COURT: Sustained.
Move on.

BY MORRISON:
Q. Did you ever have an opportunity to assist Officer Horsley in any way?
A. Yes, I assisted in getting the subject on the ground into custody.
Q. Okay. What subject was that?

A. I didn't know at the time, I learned later it was Fortin.
Q. And what were your actions in assisting?
MS. MONTGOMERY: Objection. Irrelevant and beyond the scope.
THE COURT: Sustained.
MORRISON:
Q. So we can't talk about anything other than Gipson.
THE COURT: Morrison.
BY MORRISON:
Q. So I'm going to limit my questions to Gipson.
MS. MONTGOMERY: Your Honor, I move to strike and ask the jury to disregard.
THE COURT: Sustained. The jury will disregard.
A. Well, I was watching their back. I was making sure that they weren't attacked or confronted, you know, to their back while they're dealing with one person. So I'm literally watching their back.
Q. So you were never really actually assisting them?
A. No, I didn't say that. You said what was I doing at that point. At that point, I was watching their back.
Q. Didn't you testify on direct that you were assisting them, and he drew your attention towards him by yelling?

A. I did eventually assist them, and he did draw my attention, yes.
Q. So you told him four or five times to stop?
MS. MONTGOMERY: I'm going to object and ask that we don't use pronouns. There's lots of people here. Are we talking about Gipson?
THE COURT: Morrison, just if you could clarify, please.
MORRISON: Very well.
BY MORRISON:
Q. So you directed Gipson four or five times to stop speaking?
A. If I could look at my report. I have in there what I said. It wasn't just "stop." It's not the speaking that's the problem. It's the swear words and the verbal confrontation, when it incites a crowd, it has a propensity to violence. That's the issue. I don't have an issue talking with people. I have an issue when the swear words are being directed at officers and what they're doing and it has a tendency to create unnecessary violence.
Q. But wasn't what you were worried about was people filming you?
A. Absolutely not. That can happen at any time, any day. It can be going on right now. That is law enforcement in the 21st century.
Q. Are you sure it wasn't you inciting the crowd and not Gipson?
MS. MONTGOMERY: Objection, Your Honor. It's an inappropriate question.
THE COURT: Overruled.
A. Absolutely I'm certain. Especially being a negotiator, I never know who I'm going to come into contact with or who I might have to negotiate with who's in crisis. I'm one of the guys, I would much rather talk for two hours, whatever you have to say, than fight for five seconds. I have no issue talking. I have no issue filming. There is an issue

when it becomes an officer safety issue.

RP 286-289.

C. ARGUMENTS

1. THE CURTAILEMENT OF CROSS-EXAMINATION WAS PREJUDICIAL ERROR OF CONSTITUTIONAL DIMENSION REQUIRING REVERSAL.

Officer Wofford's actions before and during the scuffle with Gipson were relevant to establish Wofford's bias and prejudice. The trial court's prohibiting Gipson from cross examining the police witnesses on the facts surrounding the fight, violated Gipson's Sixth Amendment and Article I, section 22 rights, which guarantee a criminal defendant the right to confront and cross-examine adverse witnesses, and the right to present a defense. U.S. CONST. amend. VI; Const. Art. 1, section 22; *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

a. Standard of Review

Confrontation clause violations are reviewed de novo. *State v. Jasper,* 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Limitations on cross-examination are reviewed for abuse of discretion. *State v. Fisher,* 165 Wn.2d 727, 752, 202 P.3d 937 (2009). A trial court abuses its discretion if its decision is

"manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (a*ccord, State v, Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

A court "'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.' " *State v. Iniguez,* 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting *State v. Perez,* 137 Wn.App. 97, 105, 151 P.3d 249 (2007)). Although this Court ordinarily reviews issues of exclusion of evidence for abuse of discretion, where there is an issue of a potential violation of the right to present a defense or the right to meaningful confrontation, review is de novo. *See, Jasper*, 174 Wn.2d at108; *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

b. The Trial Court Violated Gipson's Constitutional Right to Present a Defense and Cross-Examine Police Witnesses on Relevant Matters: U.S. Supreme Court and Federal Cases.

"Cross-examination of a witness is a matter of right." *Alford v. U.S.*, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931). The Supreme Court explained that the" essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" *Davis*, 415 U.S. at 315-16

(internal quotation marks and citation omitted). This guarantees the opportunity for full and effective cross-examination, including impeachment with minimally relevant bias evidence. Id.

The U.S. Supreme Court and the Ninth Circuit have repeatedly required that wide latitude be given to defendants in their cross-examination of key prosecution witnesses, *Alford,* 282 U.S. at 692; *see United States v. Bleckner*, 601 F.2d 382, 385 (9th Cir. 1979); *United States v. Stanfield*, 521 F.2d 1122, 1128 (9th Cir. 1975); *United States v. Harris*, 501 F.2d 1, 8 (9th Cir. 1974).

A court violates the "Confrontation Clause when it prevents a defendant from examining a particular and relevant topic." *Fenenbock v. Director of Corrections*, 692 F.3d 910, 919, (9th Cir. 2012). For example, "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall*, 475 U.S.673, 680., 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Gipson's Sixth Amendment rights were violated when he was denied his right to cross-examine Wofford because this prohibited him from cross-

examining Wofford about facts related to Wofford's aggression toward the woman arrested, and towards Fortin and Gipson on scene, all of which were examples of his bias that were relevant for the jury to hear. *Van Arsdall*, 475 U.S. at 680; *Alford*, 282 U.S. at 690.

In *Alford,* the Supreme Court reversed the lower court's limitation on cross-examination where the Government witness gave damaging testimony about transactions with the defendant. On cross-examination, defense counsel asked the witness about his place of current residence. **The court sustained the Government's objection that the question was immaterial and not proper cross-examination because it had not been the subject of direct examination**. Outside the presence of the jury, defense counsel told the court that he had heard that the witness was then in custody of federal authorities and that he should be entitled to bring out that fact on cross-examination "for the purpose of showing whatever bias or prejudice he may have." *Alford*, 282 U.S. at 690.

The trial court adhered to its previous ruling, stating that defense counsel was limited to inquiring about convictions for a felony. The United States Court of Appeals for the Ninth Circuit affirmed on the ground that no abuse of discretion had been shown in foreclosing that line of inquiry, and the

error, if any, was not shown to be prejudicial. The Supreme Court reversed, holding that curtailment of cross-examination under these circumstances was prejudicial error, without regard to whether the defendant was able to show any specific harm caused by the district court's ruling. *Alford,* 282 U.S. at 693-94.

Justice Stone, speaking for a unanimous Court, stated:

> ". . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citations omitted)
>
> ". . .
>
> ". . . (The fact that the witness was then in custody) could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive

> effect of his detention by officers of the United States, which was conducting the present prosecution. . . . Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention.

(Citations omitted)" *Alford,* 282 U.S. at 692-93.

Here, the court committed the same error. It ordered that Gipson not ask any questions that were not raised on direct examination. RP 271. This ruling permitted the state to sanitize its case to protect the state from any evidence that might challenge its case. This was error and an abuse of discretion in *Alford*, and it was error and an abuse of discretion in this case, the errors did not stop with that ruling. *Alford,* 282 U.S. at 694.

Gipson was unable to ask any questions to place the state's witnesses in their proper setting to demonstrate the flaws in the witnesses' testimony. This limitation prevented Gipson from providing the jury with information with which to test the weight and credibility of the state's witnesses' testimony. Under *Alford*, the fact of the limitation on cross-examination itself was prejudicial and violated Gipson's Sixth Amendment rights without the need for Gipson to establish anything other than minimal relevance, which he has done. Id.

Similarly, in *Davis*, the prosecutor was able to obtain suppression of its star witness Green's' juvenile record and the fact that he was on probation, which prevented the defense from showing his bias and prejudice based on Green's helping the police to identify Davis. The U.S. Supreme Court reversed the conviction for violation of Davis' Sixth Amendment guarantee of the right of confrontation, based on the trial court's impermissible limitation on cross-examination. *Davis*, 415 U.S. at 314.

The Court in *Davis* explained that "[t]he partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis*, 415 U.S. at 316, (quoting, 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970)). The Court recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Davis*, 415 U.S. at 316-17 (citing, *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959)).

In *Greene* the Supreme Court emphasized the extraordinary importance of permitting the defendant the opportunity to expose the possibility that the state's witnesses are not being truthful:

> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action

> seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . .'

Greene, 360 U.S., at 496.

The import of these decisions indicates that cross-examination may not be limited to the detriment of a defendant without running afoul of the Sixth Amendment. Here, the trial court did not let the defense explore any avenue to demonstrate the witnesses' credibility issues. For example: Gipson could not ask about the officers ignoring the crowd's admonishment that they were arresting the wrong person; he could not ask any questions about the police rough treatment of Fortin; and he could not ask why the police refused to investigate the perpetrators of the fight even though they knew arrested the wrong person. These questions would have explained the reasons for Gipson's agitation, and the police responsibility for creating a hostile situation, and arresting Gipson, because they did not want to hear what he had

to say. Before Gipson was arrested, there was no evidence that Gipson did anything except voice his frustration to the police about their arresting the wrong people.

The record reveals that Gipson was prevented from pursuing a line of questioning that was relevant and that focused on the issues in dispute: (1) whether the police were untruthful in declaring that Gipson assaulted Wofford; (2) tried to take his gun; and (3) whether the police instigated the aggression by taking Gipson into custody for simply voicing his opinion about the wrongful arrests.

To reveal the police bias, Gipson needed to explore the arrest setting by cross- examining Wofford on his police report, and his actions leading up to grabbing Gipson, which would have demonstrated that Wofford was not telling the truth about Gipson assaulting him and trying to take Wofford's gun. Gipson did not have any other means to show this to the jury. The trial court 's refusal to permit cross-examination also violated Gipson's right to pursue his theory of the case that Wofford incited the incident and had no right to take Gipson into custody for simply speaking his mind.

The trial court articulated the following improper grounds for repeatedly refusing to permit Gipson to cross examine Wofford. First, the

trial court did not understand that establishing that the police allowed the perpetrators of the bar fight to leave the scene without any investigation was relevant to place the witnesses in their proper setting under *Alford*. *Alford*, 282 U.S. at 692-693.

Second, the trial court believed that the defense could not elicit that the police were responsible for the aggression unless the defense produced an expert, even though under *Davis,* the police behavior is relevant to discredit a police witness and to show bias. *Davis*, 415 U.S. 314. Third, the trial court did not allow any questions regarding Wofford's police report because the court believed the contents of the police report were collateral and cross-examination of Wofford about the content police report would be impeachment on collateral matters. *See, Gordon v.* U.S., 344 U.S. 414, 420-21, 73 S.Ct. 369, 97 L.Ed. 447 (1953). This was incorrect:

> **We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence,** providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the

document's impeaching weight and significance.

Id. This information was admissible because it would have challenged the police credibility. *Davis*, 415 U.S. 314; *Greene*, 360 U.S., at 496*; Gordon*, U.S., 344 U.S. at 420-21.

Fourth, the trial court expressly limited the defense to only asking questions that were asked on direct: "[w]e're not going to go into anything other than what he testified to on direct." RP 27; 266-276. When Gipson tried to ask Wofford about what was happening while Fortin was on the ground and Gipson was in the crowd, the trial court accused Gipson of trying to create evidence. RP 271. This limitation prevented Gipson from placing the witnesses in their setting and it prevented him from presenting his theory of the case in violation of the Sixth Amendment. *Alford,* 282 U.S. at 690-693.

Gipson was not allowed to inquire at all about the lack of investigation or the officers reasons for responding to the 911 call. RP 273. The trial court refused to permit Gipson to ask about the fact that the police called the Sheriff for backup even though that was testified to on direct examination. RP 243, 276. Gipson was prevented from asking about the person Wofford arrested as soon as he arrived on scene or about any of the contacts made my Wofford. RP 276-77, 286-289. On several occasions the

trial court also refused to permit counsel to take matters outside the presence of the jury. RP 281, 282, 322.

The following summarizes the nature and extent of the trial court's limitation on cross-examination:

> THE COURT: Morrison, you were advised that the scope of the direct commenced when the officer indicated that he observed Fortin on the ground and he drew his attention to the defendant from his behavior. That is the beginning of the fact pattern as to what happened on the 19th. That was the limit of the scope of direct.
>
> MORRISON: You can't limit me on that.
>
> THE COURT: I can too.
> MORRISON: It's error. That is error. You are limiting our ability --
>
> THE COURT: Morrison, I ruled.
>
> MORRISON: -- to put on our case, Your Your Honor. That's not fair. You're picking sides.
>
> THE COURT: No, Morrison. I've limited you in accordance with the rules of evidence. If you want to look them over --
>
> MORRISON: I have looked them over. And you know darn well --
>
> THE COURT: Bring the jury back.
>
> MORRISON: Please allow me to make my

record for the Court of Appeals.
THE COURT: You've made your record,
Morrison.

MORRISON: I have not completely.
You're picking sides here. You're limiting a officer's report.[sic]

THE COURT: Morrison, the entire scope
of a police report is not relevant necessarily in a
trial, and you well know that.

MORRISON: Do you know the facts?

THE COURT: Morrison, do not argue with
me. Let me make very clear to you, you should know
the rules of evidence. The State limited the scope
of their direct, they're entitled to do so. That
doesn't open it up for you to go down any path you
choose to, and that's the situation.

MORRISON: They can't hide evidence for
the sole purpose of not allowing me not to talk about
it.

THE COURT: What evidence are they hiding?

MORRISON: They're hiding the fact that
he knew darn well that he comes straight up and
arrests somebody. They came out --

THE COURT: How is that relevant?

MORRISON: He testified that -- he said
that you arrested the wrong person. Well, who is
this person? He testified to it.

THE COURT: How is that relevant whatsoever?

MORRISON: I can go into it. He testified on the stand. You're telling me I can't go into what that meant, you arrested the wrong person.
Is that what you're saying?

THE COURT: What I'm telling you is you need to stick to what is relevant.

MORRISON Well, I disagree.
THE COURT: You can bring back the jury. It is relevant.

.....

BY MORRISON:
Q. What's the first thing that you did in response to this situation?

MS. MONTGOMERY: Objection. Same objection.

THE COURT: Rephrase your question, Morrison.

BY MORRISON:
Q. Let's start with, did you pepper-spray someone?
MS. MONTGOMERY: Objection. Beyond the scope.

THE COURT: Sustained.

RP 279-284. This portion of the transcript demonstrates the trial court believed that Gipson was not entitled to cross-examine the witnesses if the prosecutor did not ask the specific question on direct. In essence the trial

court ruled in favor of permitting the state to present a sanitized case without any effective challenge; why bother with a trial?

The trial court excluded all meaningful cross-examination of Wofford regarding his bias and credibility. This evidence was relevant to determine if Wofford was misleading the jury regarding the extent of Gipson's behavior and information in the police report contradicted Wofford's testimony. CP 1-4. Cross-examination could have discredited Wofford and colored the jury's perception of Wofford which would have affected the weight of his testimony.

In addition, Wofford's credibility and bias concerned the heart of Gipson's defense, whether he committed the acts Wofford described on direct examination. Gipson was not required to establish that the cross-examination would have resulted in a different outcome at trial because "[t]he partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' (citation omitted). *Davis*, 415 U.S. at 314. In sum, the trial court's rulings annihilated Gipson's Sixth amendment and Article 1, section 22 rights. *Alford, supra; Davis, supra; Green, supra.*

c. <u>The Limitation on Cross-Examination Was Not Harmless Error</u>.

"A denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Smith*, 390 U.S. at 131 (quoting, *Brookhart v. Janis,* 384 U.S. 1, 3, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

The violation of the confrontation clause here requires reversal without consideration of whether the error was harmless because the Supreme Court has declared repeatedly that a denial of the right of cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Smith v. Illinois,* 390 U.S. 129,131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Davis* 415 U.S. at 314.

d. State Cases.

A defendant has both a U.S. Const. Sixth Amendment and Const. art. 1, section 22 right to present his version of the facts and a right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). This right can only be limited in so far as a defendant does not have a right to present irrelevant evidence, but he defendant must be given "more latitude" to cross-examine an "essential" witness. *Darden*, 145 Wn.2d at 619; *State v. Hudlow,* 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

If evidence is relevant, the trial court may not exclude it unless the

evidence would disrupt the fairness of the fact finding process. *Hudlow,* 99 Wn.2d at 15. On the other hand "[a]s to evidence of high probative value, however, it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *State v. Hudlow,* 99 Wn.2d at 16.

A defendant's confrontation right to challenge the accuracy and veracity of a key witness for the State triumphs over the State's asserted interest to not reveal the precise location of an observation post. *Darden.* In *Darden*, the defense was denied the opportunity to cross examine a police witness regarding his surveillance location while the officer allegedly observed the defendant involved in a drug transaction. *Darden*, 145 Wn.2d at 617-18. The State argued that the surveillance location was secret and not relevant. *Darden,* 145 Wn.2d at 618. The trial court agreed. *Darden,* 145 Wn. 2d at 618. The Court of Appeals upheld the limitation on cross-examination and the Supreme Court reversed the Court of Appeals because the evidence was relevant and its exclusion violated Darden's state and federal constitutional rights. *Darden,* 145 Wn. 2d at 626, 628.

As under federal case law, even if the evidence is only of minimal relevance, our Supreme Court has cautioned courts to balance the interests by

tipping the balance heavily against the State and against exclusion of the evidence:

> The State's interest in excluding [even] prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.' **We must remember that 'the integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations.**

Jones, 168 Wn.2d at 720 (citations omitted; emphasis added).

As a result, when evidence is of high probative value, the Supreme court has flatly stated that there is **no** state interest that can justify its exclusion and excluding such evidence is a violation of the Sixth Amendment and Article I, § 22. Id.; *see also, Hudlow*, 99 Wn.2d at 16. In this case, the evidence was of such high probative value, that its exclusion violated the Sixth Amendment and Article I, § 22. Id.

2. THE TRIAL COURT ERRED IN FINDING THAT GIPSON COMMITTED THE AGGRAVATING FACTOR RETALIATING AGAINST A PUBLIC OFFICAL OR OFFICER, BECAUSE THERE WERE NO PUBLIC OFFICALS OR PUBLIC OFFICERS INVOLVED IN HIS CASE.

Police officers are "peace officers" not "public officers" or "public servants". RCW 9A.04.110(13),(15),(23). The trial court erred by imposing

an exceptional sentence based on the aggravating factor retaliating against a "public officer" because there were no public officers involved in this case.

The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Aggravating factors must be determined by a jury under the Sixth Amendment. RCW 9.94A.537; *State v. Borboa,* 157 Wn.2d 108, 118, 135 P.3d 469 (2006) (citing, *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

The reviewing Court must reverse an exceptional sentence if (1) the record does not support the sentencing court's reasons, (2) the reasons do not justify an exceptional sentence for this offense, or (3) the sentence was 'clearly excessive.' RCW 9.94A.585(4).

A special verdict finding the existence of an aggravating circumstance is reviewed under the sufficiency of the evidence standard. *State v. Stubbs,* 170 Wn.2d 143 117, 123, 240 P.3d 143 (2010); *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011). Under this standard, the reviewing Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Chanthabouly*,

164 Wn. App. 104, 142-43 (citing, *State v. Yates,* 161 Wn.2d 714, 752, 168 P.3d 359 (2007)).

a. Retaliation Against Public Officer

The state charged Gipson with the aggravating factor retaliating against a public official or officer as set forth in RCW 9.94A.535(x). CP 8-12. RCW 9.94A.535(3)(x) provides as follows:

> The defendant committed the offense against a **public official or officer** of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(Emphasis added). RCW 9A.04.110(13) provides:

> (13) "**Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer** and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;

Id. Jury instruction number 20 mirrors this definition through the above portion emphasized in bold. CP 73-99. WPIC 2.14 provides a definition of "public officer in accord with RCW 9A.04.110(13). WPIC 2.14. The note on use for WPIC 2.14 however explicitly provides that this definition does not apply to police officers.

> **Do not use this instruction to define public servant or peace officer.** Those terms have their own statutory definitions. See WPIC 2.22 (Public Servant—Definition) and WPIC 2.16 (Peace Officer—Definition).

Id. (Emphasis added). This was however, the instruction the court used in Gipson's case. CP 73-99.

WPIC 2.16 defines "Peace Officer:

> **Peace officer means a duly appointed city, county, or state law enforcement officer.**

(Emphasis added) Id. The correct definition of Peace officer is located in RCW (15) RCW 9A.04.110(15) and provides as follows:

> (15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;

Id.

Police officers are not 'public officers' under RCW 9.94A.535(3)(x) but rather "peace officers" defined under RCW 9.94A.110(15). Because there were no public officers involved in Gipson's case and the jury did not find that Gipson retaliated against a peace officer, the trial court erred in entering findings and conclusions in support of this aggravating sentence. The record does not support the sentencing court's reasons, and the reasons do not justify an exceptional sentence for this offense. RCW 9.94A.585(4). For this reason,

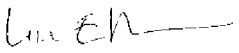
Gipson requests this Court vacate his exceptional sentence.

D. CONCLUSION

Gipson respectfully requests this Court reverse his conviction and remand for a new trial based on violation of his state and federal constitutional right to cross-examine witnesses. Gipson also requests this Court vacate his exceptional sentence because the facts and law do not support its imposition.

DATED this 19th day of November 2014.

Respectfully submitted,



_____
LISE ELLNER
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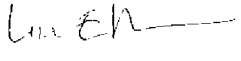
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and to Mathew Gipson, DOC# 302999 Clallam Bay Corrections Center 1830 Eagle Creek Way Clallam Bay, WA 98326 true copy of the document to which this certificate is affixed, on November 19, 2014. Service was made by electronically to the prosecutor and to Mr. Gipson by depositing in the mails of the United States of America, properly stamped and addressed.



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